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Supreme Court of the United States

October Term, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner The Northern Cheyenne Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 28, 1975. This action was originally brought by the Northern Cheyenne Tribe against the following named defendants, William Hollowbreast, Grace Kingfisher, Raymond Brady, Sr., Kenneth Beartusk, Winona Fox, James Limberhand, Henry Fisher, Bessie Elkshoulder, Nellie Robinson, and Raymond Harris, Sr., as representatives of the class of all allottees, their heirs and devisees, who received allotments pursuant to the Act of Congress of June 3, 1926, 44 Stat. 690, as amended, the Northern Cheyenne Allotment Act.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 505 F.2d 268 (1974). The opinion of the District Court for the District of Montana is reported at 349 F.Supp. 1502 (1972). Both opinions are set out in the Appendix at A-1-29.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 17, 1974; see Appendix at A-33-34. On December 28, 1974, Associate Justice William O. Douglas of the United States Supreme Court entered an order extending the time to file a petition for writ of certiorari to March 1, 1975. On February 19, 1975, Associate Justice William J. Brennan, Jr. of the United States Supreme Court entered an order further extending that time to March 16, 1975. On February 20, 1975, Petitioner filed with the Ninth Circuit Court of Appeals a motion for leave to file an untimely petition for rehearing. On February 28, 1975, the Ninth Circuit Court of Appeals entered an order granting Petitioner leave to file a petition for rehearing and recalling the original mandate; see Appendix at A-31-32. On March 14, 1975, Petitioner filed a petition for rehearing with the Ninth Circuit Court of Appeals. The Court of Appeals invited Respondents to submit briefs, considered the petition for rehearing on the merits, and on April 28, 1975, entered an order denying the petition for rehearing; see Appendix at A-30. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The entire Northern Cheyenne Indian Reservation rests upon a prime, untapped coal deposit of immense economic

value. The initial fate of this deposit was determined in 1926, when Congress enacted the Northern Cheyenne Allotment Act, 44 Stat. 690, which withheld all reservation minerals from allotment, but provided that these minerals would become the property of the allottees or their heirs after 50 years. However, in a 1968 amendment to the Act, 82 Stat. 424, Congress provided that the minerals would remain in tribal ownership in perpetuity.

1. Did the 1926 Act, as amended, endow the allottees, their heirs or devisees[1] with a vested property right in the minerals which is protected by the Fifth Amendment?

2. Did Congress, in enacting the 1926 Act, as amended, relinquish the power to alter the statutory plan contained therein for allotment of the minerals 50 years hence?

3. In resolving the two questions above, is it proper to utilize the following rules of construction which this Court has promulgated to interpret Indian legislation:

a. the rule which seeks the Indian understanding of the legislation;

b. the rule that statutes enacted for the benefit of Indians are to be liberally construed in their favor; and

c. the rule which requires that the circumstances surrounding the enactment of legislation be considered?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. The 1926 Act specified "the allottees, or their heirs" as recipients of that future allotment. In 1961, Congress amended the Act to add devisees to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586. Appendix at A-43.

The Northern Cheyenne Allotment Act, as amended: Act of June 3, 1926, 44 Stat. 690; Act of July 24, 1947, 61 Stat. 418; Act of September 22, 1961, 75 Stat. 586; Act of July 24, 1968, 82 Stat. 424. These statutory provisions are set out in the Appendix at A-38-45.

Executive Order of November 26, 1884, 1 Kappler, Indian Affairs, Laws and Treaties at 860, which created the Northern Cheyenne Reservation; Executive Order of March 19, 1900, 1 Kappler Indian Affairs, Laws and Treaties at 860 which enlarged the Northern Cheyenne Reservation; these executive orders are set out in the Appendix at A-45-48.

STATEMENT OF THE CASE

This case arises from Congress' uncertainty about the extent of its power over Indian lands. After determining that all minerals on the Northern Cheyenne Indian Reservation should remain tribally owned, Congress in 1968 repealed the executory portion of its 1926 allotment plan for the Reservation. This executory provision had envisaged a future allotment—in 1976—of all minerals lying beneath the allotted portions of the Reservation's surface. However, in light of the Fifth Amendment, Congress in 1968 was concerned that the 1926 Act had possibly endowed the allottees, their heirs or devisees with a vested, constitutionally-protected property right to the future distribution of the minerals. Accordingly, Congress made the effectiveness of the 1968 Amendment contingent upon the bringing of this suit to determine the issue of congressional power:

> The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926,

> as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

Appendix at A-45.

The Northern Cheyenne Allotment Act of 1926

The 1926 Act is an unambiguous piece of legislation with a clear and logical formulation. Section 1 declares the entire Reservation to be the property of the Tribe. This was the first explicit congressional confirmation of the Tribe's title to the Reservation. It endowed the Tribe with "recognized" title to the lands, a vested property interest.[2] In addition, section 1 states explicitly Congress' continuing plenary power over the entire Reservation:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby declared to be the property of said Indians, *subject to such control and manage-*

2. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 85, 103 (1949) (dictum).

ment of said property as the Congress of the United States may direct.

Appendix at A-38 (emphasis added).

The allotment provisions are contained entirely in section 2. Section 2 authorizes limited allotments of 160 acres of agricultural and grazing lands to living tribal members. Allotment was to be consummated by the issuance of a trust patent, designating the entire allotment as a homestead, inalienable for 25 years or until death of the allottee:

> Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred sixty acres to any individual from the lands appearing on said approved lists . . . *Provided*, That trust patents be issued therefor of the form and legal effect authorized by the Act of February 8, 1887, Twenty-fourth Statutes at Large, page 388, as amended, and the lands so alloted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

Appendix at A-38-39.

The remainder of the Act is concerned primarily with identifying those portions of the Reservation immune from allotment, and remaining, therefore in the ownership of the Tribe.

Section 3 excludes the minerals and timber from allotment[3], announces the congressional plan for the transfer of the minerals beneath allotments to the allottees or their heirs after 50 years, and states explicitly Congress' continuing plenary power over all property withheld from allotment. In addition, tribal leasing of the minerals and timber is authorized:

> Sec. 3. That the timber, coal or other minerals including oil, gas, and other natural deposits, on said reservation *are hereby reserved for the benefit of the tribe* and may be leased with the consent of the Indian Council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotment shall *become* the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.*

Appendix at A-39-40 (emphasis added).

It is this section which raises the ultimate issue in this case: whether the provision allotting minerals after 50 years vests the allottees, their heirs or devisees[4] with a constitutionally-

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3. However, in 1947, by amendment of the Act, the timber on the allotments was granted to the allottees. The 1947 Amendment made a present grant of the timber in the following terms: ". . . the timber on the allotments on the Northern Cheyenne Indian Reservation . . . are hereby declared to be the property of the allottees. . . ." Act of July 24, 1947, 61 Stat. 418. Appendix at 42-43.

4. See note 1, *supra*.

protected right—thereby depriving Congress of the power to alter its plan for future mineral distribution.

Section 4 enumerates additional portions of the Reservation which are withheld from allotment. It also provides that all income from leasing of minerals and timber is to be held as tribal property for the benefit of the Tribe as a whole. Section 5, the final section of the Act, deals exclusively with appropriations.

Allotments were not actually made until 1932. Approximately 53 per cent of the Reservation surface was then allotted[5]. The trust patents making the allotments provide in relevant part:

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian, the above-described land as a Homestead, subject to all the provisions, conditions, limitations, and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Chyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.*

Appendix at A-54-55 (emphasis added).

1968 Amendment of the Northern Cheyenne Allotment Act

Between 1926 and the mid-1960s, the tribal development of reservation minerals—which Congress had envisioned in the 1926 Act[6]—had not occurred. However, this situation

5. During the 1940s the Tribe commenced a program of reacquiring allotments. As a result of this program, 62 per cent of the surface of the Reservation is in tribal ownership. It is not clear whether in these acquisitions the Tribe acquired as well the allottees' expectancies in the minerals beneath the acquired allotments. The remainder of the Reservation surface is owned almost entirely by tribal allottees.

changed in the late 1960s when it became apparent that the Northern Cheyenne Tribe might, for the first time, actually be in a position to develop its mineral resources. These circumstances led to the enactment of the 1968 Amendment.

In adopting this amendment, Congress concluded that it would be inimical to the best interests of the Northern Cheyenne Tribe to carry through with the plan of transferring the minerals to the allottees, their heirs or devisees in 1976.[7] Accordingly, section 3 of the 1926 Act was amended to read as follows:

> Sec. 3(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

6. To this end, the 1926 Act authorized leasing of the minerals with the consent of the Tribal Council, and provided that all income therefrom would be held in trust to be expended for the benefit of the Tribe. As stated by the House sponsor of the 1926 Act upon its passage:

> This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe, but it also preserves tribal grazing and timber lands for the benefit of the entire tribe, and offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe. In other words, it finally and fully confirms the title of the tribe in such a way as to develop their homes and give the Indians the fullest possible benefit of their natural resources. . . .

67 CONG. REC. 9886 (1926).

7. "If the mineral resources are reserved to the tribe in perpetuity, the income can be used for the benefit of all tribal members. If the minerals are allowed to become the property of the individual allottees, some persons will benefit greatly, and others will not benefit at all, depending upon where the minerals happen to be found." H.R. REP. No. 1292, 90th Cong., 2d Sess. 2 (1968); S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Act of July 24, 1968, 82 Stat. 424. Appendix at A-44-45. In addition, Congress inserted the litigation provision which gave rise to this suit.

Decisions Below

Invoking jurisdiction based upon this litigation provision, the Northern Cheyenne Tribe commenced suit in the United States District Court for the District of Montana against the above-mentioned class of allottees, their hiers or devisees. The district court ruled that Congress did have the power to amend the 1926 Act, concluding that this enactment bestowed upon defendants no vested property right in the minerals which is protected by the Fifth Amendment; see Appendix at A-36-37. On appeal, the Ninth Circuit Court of Appeals reversed. Relying on inapplicable rules of construction and on a misinterpretation of *Choate v. Trapp*, 224 U.S. 665 (1912), the court concluded that Congress lacked power to amend the Act; see Appendix at A-33-34.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Declared Unconstitutional an Act of Congress Which Resolves a Conflict Between National Energy Policy and the Federal Trust Responsibility to Indians. The Result Endangers the Survival of the Northern Cheyenne People.

A serious dilemma arose in the late 1960s due to the vast untapped coal reserve on the Northern Cheyenne Reservation. National energy needs projected the Northern Cheyenne people, who like their coal had long been ignored, into the American energy arena. Major energy companies,

including the Peabody, Amax, and Consolidation coal companies began pursuing rights to mine that coal. Inevitable conflicts followed.

On the one hand, rising national energy demands, new coal conversion techniques, and the superior economics of strip mining over deep mining created intense interest in western coal reserves. Moreover, the low sulphur content of western coal made it especially attractive in light of increasingly stringent air pollution standards, which traditional eastern coal could not meet.

Prime among these western coal deposits is the immense Northern Cheyenne reserve. Totaling approximately 5.2 billion tons, it spans the entire Reservation.[8] Unusually great bed thicknesses, low overburdens, and gently rolling terrain render this coal ideal for strip mining.[9] The result: Northern Cheyenne coal has been projected into a position of national significance with an economic value of no less than two billion dollars.[10]

On the other hand, it became clear to the Cheyennes and to responsible government officials, that while coal development on the Reservation might lift the people out of intense poverty, it might also result in destruction of the

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8. United States Bureau of Mines Study, *Mineral Resources and Their Potential on Indian Lands, Northern Cheyenne Reservation, Big Horn and Rosebud Counties*, at 23 (unpublished).

9. The Montana Bureau of Mines and Geology estimates that one 13,560 acre section of the Reservation averages 88,500 recoverable tons per acre. *Northern Cheyenne Planning Study*, Department of Intergovernmental Relations, Division of Planning and Economic Development, State of Montana (1973) at 10.

10. This is a conservative estimate based on a recent offer by Shell Oil Company to the Crow Indian Tribe for coal located beneath the Crow Reservation, which adjoins the Northern Cheyenne Reservation on the west. *Billings Gazette*, July 9, 1975, at page 1.

Northern Cheyenne culture. This culture is a product of a unique history. No other tribe, except perhaps the Sioux, more fiercely resisted the white man's march into the Great Plains.[11] The Northern Cheyennes, with the Sioux, defeated Custer at the Little Bighorn in 1876, and responded to their subsequent banishment to Oklahoma with a defiant trek back to Montana to reclaim their homeland which is now the Reservation. Believing them singularly unqualified for the "civilizing" benefits of allotment, Congress waited until 1926 before it enacted an allotment plan for the Northern Cheyennes. Furthermore, Congress gave them the most limited of allotment acts, and did not provide for the opening of the Reservation to white settlement.[12]

The Reservation today remains almost entirely within Indian ownership.[13] Traditional grazing, farming, and timbering activities remain the predominant land uses. The absence of industrial development has left fully intact the grassy high plains and rolling hills. The Reservation population is overwhelmingly Indian; approximately 3,000 of some 3,600 enrolled Northern Cheyennes live on the Reservation.[14] The Northern Cheyennes have retained the integrity of their Indian culture; the Cheyenne language is

11. R. Andrist, *The Long Death–The Last Days of the Plains Indians* 70 (1964).

12. By contrast, sale of unallotted lands to whites was a key element of the allotment acts given other allotted reservations in Montana. Crow: Act of June 4, 1920, 41 Stat. 751; Blackfeet: Act of March 1, 1907, 34 Stat. 1015, 1035; Fort Peck: Act of May 30, 1908, 35 Stat. 558; Flathead: Act of April 23, 1904, 33 Stat. 302.

13. Approximately 62 per cent of the land is tribally owned; the remainder is almost exclusively owned by tribal allottees. See note 5, *supra*. This stands in marked distinction against the other allotted Indian reservations of Montana.

14. *Northern Cheyenne Planning Study*, note 9, *supra*, at 45.

widely spoken, and traditional customs and rituals are practiced. In summary, the Northern Cheyenne Reservation remains today what it has been from it inception: a homeland for a distinct Indian people and culture.

Strip mining would affect every aspect of Reservation life and every member of the Reservation community. It would raise fundamental questions about the continued viability of the Reservation as a homeland. Consequently, decisions concerning development require a deep sense of awareness of *all* competing benefits and costs. The United States Congress has concluded that only the Northern Cheyenne People *as a whole* should make such decisions. Pursuant to its trust responsibility, Congress implemented this determination by enacting the 1968 Amendment which maintains in the Tribe as a whole decisionmaking power over the entire coal deposit.[15]

The decision of the court below, however, annulled that congressional determination on constitutional grounds. The result will be chaotic decisionmaking with regard to 53 per cent of the coal reserve, and, potentially, a disastrous land rush reminiscent of those which devastated the oil-rich Indian reservations of Oklahoma. Decisions regarding devel-

15. Secretary of Interior Rogers C. B. Morton held similarly in a decision on a Tribal petition concerning coal development on the Reservation presented directly to him in January, 1974. After extensive personal deliberation, Secretary Morton held:

> As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation.
>
> . . . . Furthermore, the Tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me.

Written decision of Secretary of Interior Rogers C. B. Morton, dated June 4, 1974, on petition of Northern Cheyenne Tribe concerning coal development on the Reservation.

opment of that portion of the reserve will be made simply on the basis of the economic self-interests of the individual members of the respondent class,[16] without regard to the general welfare of the Tribe as a whole. Moreover, since each allotment is multiply owned, each member of the class will control only a fractional interest in the minerals under his own allotment. Therefore, he will be vulnerable to unscrupulous land speculators who historically have descended upon newly allotted reservations to exploit the distributed lands and resources.[17] In 1934[18] Congress acted to end permanently the allotment system because of the massive Indian land losses produced by this system.[19] It would be tragically ironic if that scenario were reenacted on the Northern Cheyenne Reservation in 1976 because of a future allotment provision enacted in 1926, only eight years prior to Congress' closing of the allotment chapter of American Indian history.

These dangers have resulted directly from the Ninth Circuit's decision striking down the 1968 Amendment on constitutional grounds. That drastic judicial action merits the review of this Court.

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16. This is a disparate group consisting primarily of tribal members, but also including a substantial number of non-member Indians and whites. Many of these people live far from the Reservation, and have no immediate interest in the general welfare of the residents of the Reservation.

17. Cohen, *Handbook of Federal Indian Law* (1941) at 215-217. In fact, promptly after the court below entered its decision, such persons appeared on the scene to "assist" the allottees in marketing their coal interests. One approach suggested the formation of a society "to assist members with money matters so that they and their heirs will receive monthly checks for 100 years or more."

18. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-462.

19. Hearings on H.R. 7902 before the Committee on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934).

2. This Case is a Product of Congress' Uncertainty About the Nature of Its Power Over Indian Lands Rooted in a Misunderstanding of a Fifth Amendment Decision of this Court

After concluding that its *duty* as guardian of the Northern Cheyenne people required that ownership and control of the coal deposit remain wholly with the Tribe, Congress became concerned that it lacked the *power* to implement that conclusion. Accordingly, Congress made the effectiveness of the 1968 Amendment expressly contingent upon a judicial determination that such power existed.[20]

This congressional uncertainty was rooted in a misunderstanding of *Choate v. Trapp*, 224 U.S. 665 (1912). The court below fell victim to that misunderstanding. As a result, Congress now stands erroneously advised as to the nature and extent of its power. Thus, grave consequences exist regarding the future exercise of the congressional trust responsibility over allotted reservations. It is imperative, therefore, that certiorari be granted—so that Congress may be correctly and definitively advised on this issue.

3. Based on a Misconstruction of this Court's Holding in *Choate v. Trapp*, the Court Below Drew Erroneous Conclusions About the Extent to Which Congressional Power over Indian Lands is Limited by the Fifth Amendment.

The court below held that *Choate v. Trapp*, 224 U.S. 665 (1912) insulated the allottee's expectancy in the minerals from congressional power. *Choate v. Trapp*, however,

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20. The district court ruled on September 30, 1971 that this case presents a justiciable case and controversy within the meaning of Article III, Section 2 of the United States Constitution. This ruling was not appealed.

is a very limited holding and is in no way dispositive of the issues in the case at hand. The *Choate* holding is founded upon the existence of a contract, the Atoka Agreement, made between the Dawes Commission[21] and the Choctaws and the Chickasaws in 1897. Under the agreement, each tribal member was to receive an allotment which was to be nontaxable for a limited period of time. As consideration for the allotment, each tribal member consented to the allotment of all tribal lands and relinquished his interest in virtually all tribal property. However, before the period of nontaxability had run, Congress repealed the tax exemption. The Court held that the owners of the nontaxable land possessed a vested right to the tax exemption which Congress had no power to remove without compensation. The existence of the Atoka Agreement, and, the Indian relinquishment of all rights to tribal land as consideration for the nontaxable land are referred to throughout the opinion. As the Court stated at 672:

> There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claim to other lands furnished a part of the consideration, if, indeed, any was needed, in such case, to support either the grant or the exemption.

Subsequent cases have confirmed that the *Choate* decision *only* protects rights arising from contract. In *Gritts v. Fisher*, 224 U.S. 640 (1912), decided on the same day as *Choate*, the Court rejected the Fifth Amendment argument

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21. The Dawes Commission was a body constituted by Congress and authorized to negotiate with the Five Civilized Tribes (which included the Choctaws and the Chickasaws) for the purpose of extinguishing tribal title to reservation lands, by means of either allotment or cession of title to the United States. Act of March 3, 1893, 27 Stat. 612, 645.

that a 1902 statute had created vested rights in allottees—on the ground that such an argument "treats the Act of 1902 as a contract, when it is only an act of Congress and can have no greater effect." 224 U.S. at 648. The Court was even more emphatic in *Brader v. James*, 246 U.S. 88 (1918):

> The plaintiff in error relies upon *Choate v. Trapp*, 224 U.S. 665, in which this Court sustained a contractual exemption as to taxation of certain Indian lands. In that case, the right of exemption was based upon a valid and binding contract. . . .

246 U.S. at 97.

Similarly, in *Sweet v. Schock*, 245 U.S. 192 (1917), this Court stated:

> In *[Choate v. Trapp]* it was decided that an Indian of one of the Five Civilized Tribes had an equitable interest in tribal lands which when given up constituted a consideration for his allotment and its exemption from taxation. . . .

245 U.S. at 196. And *see Carpenter v. Shaw*, 280 U.S. 363, 367 (1929); *County of Mahnomen v. United States*, 319 U.S. 474, 476, 480.

A second point must be made about the narrow scope of the *Choate* rule: it protects only *consummated* allotments. As stated in the *Choate* opinion:

> Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent. . . .

224 U.S. at 672. The significance of this aspect of *Choate* was later confirmed in *Sizemore v. Brady*, 235 U.S. 441 (1914), another case dealing with the Fifth Amendment and Indian property rights:

> [T]he power of Congress was not exhausted or re-

> strained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by *carrying the agreement into effect* could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.

235 U.S. at 450 (emphasis added). Since the patents delivered under the Northern Cheyenne Allotment Act did not convey the minerals to the allottees—and, to the contrary, explicitly reserved them for the tribe—*Choate v. Trapp*, is not dispositive of the issues in the case at hand.[22]

The Ninth Circuit's misinterpretation of *Choate v. Trapp*, is a serious error which exacerbates the problem of congressional uncertainty as to its power over Indian lands; to eliminate this damaging uncertainty, the Ninth Circuit's error should be corrected by this Court.

4. The Decision Below Conflicts With Decisions of This Court Which Hold That Congress Retains Continuing Power to Alter a Statutory Plan for the Distribution of Tribal Property to Tribal Members.

This Court in *United States v. Jim*, 409 U.S. 80 (1972), considered whether Congress had the power, consistent with the Fifth Amendment, to alter a 1933 statutory plan which distributed specified tribal assets to a distinct community within a tribe. This plan provided that royalties from minerals beneath the Anteh Extension, a remote area annexed to the Navajo Reservation, accrue solely to the benefit of the Anteh Extention Community. However, in 1968, Congress amended the plan "to spread the benefit of the royalties more broadly among the Navajo community."

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22. In addition, *Choate v. Trapp* is inapplicable to the issues of this case since *Choate* was in no way concerned with the power of Congress to reallocate a benefit held in trust as between the tribe and the individual allottees. *See* Reason 4, *infra*.

409 U.S. at 81. The district court declared the amendment violative of the vested property rights of the members of the Anteh Extension community. This Court reversed per curiam on the following basis:

> Congress in 1933 did not create constitutionally protected property rights in the appellees. . . . To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo reservation. *But it was well within the power of Congress to alter that distributional scheme.*

409 U.S. at 82 (emphasis added) (footnote omitted).

The *Jim* decision relied primarily on *Gritts v. Fisher*, 224 U.S. 640 (1912). *Gritts* involved the Cherokee allotment act which provided for an initial allotment of tribal lands and a future distribution, to the original allottees, of all remaining lands and tribal treasury funds. However, in 1906, prior to the contemplated future distribution, Congress amended the act to significantly expand the class of persons eligible for that final distribution. The original allottees' claim that the amendment unconstitutionally impaired a vested property right in that final distribution was denied as follows:

> But it is said that the Act of 1902 contemplated that [the original allottees] alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting duly born members of the tribe to the allotment and distribution. The difficulty with appellants' contention is that it keeps the Act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U.S. 76, 93. *It was . . . subject to*

change by Congress at any time before it was carried into effect and while the tribal relations continued.

224 U.S. at 648 (emphasis added).

Under this principle, numerous sorts of amendments to distributional plans have been sustained by this Court:

a. Amendments extinguishing the right to receive an allotment:

Chase, Jr. v. United States, 256 U.S. 1 (1921); *United States v. Rowell*, 243 U.S. 464 (1917); *Sizemore v. Brady*, 235 U.S. 441 (1914); *Lowe v. Fisher*, 223 U.S. 95 (1912); *Wallace v. Adams*, 204 U.S. 415 (1907); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).

b. Amendments diminishing the value of prospective benefits:

United States v. Jim, supra; Gritts v. Fisher, supra.

c. Amendment encumbering a prospective allotment: *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920).

d. Amendment divesting the tax immunity of the allotment:

Sweet v. Schock, 245 U.S. 192 (1917); and

e. Amendments extending, reimposing, or removing restrictions on alienability of the allotment:

United States v. Jackson, 280 U.S. 183 (1930); *Brader v. James*, 246 U.S. 88 (1918); *Williams v. Johnson*, 239 U.S. 414 (1915); *United States v. Bartlett*, 235 U.S. 72 (1914); *Goat v. United States*, 224 U.S. 458 (1912); *Heckman v. United States*, 224 U.S. 413 (1912); *Tiger v. Western Investment Company*, 221 U.S. 286 (1911).

The decision of the court below holding that the 1968 amendment divested the allottees of a vested property right cannot be reconciled with the decisions of the Court cited above.

5. The Decision of the Court Below Conflicts with Decisions of this Court Which Establish that Congress Need Not Reserve Specifically Its Inherent Power to Amend a Statutory Plan for Allotment.

The court below held that in order for Congress to preserve its power to amend the 1926 Act, "a clear expression of Congress' retained power" must be included in the Act.[23] No cases were cited for that proposition. Moreover, the court's holding was in conflict with decisions of this Court which establish that no reservation of power whatsoever is necessary.

Congress possesses plenary power to adjust enacted schemes for the allocation of tribal property as "might become necessary or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917). And *see United States v. Jackson*, 280 U.S. 183 (1930); *Chase, Jr. v. United States*, 256 U.S. 1 (1921); *Brader v. James*, 246 U.S. 88 (1918); *Sweet v. Schock*, 245 U.S. 192 (1917);

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23. The court below reasoned that in three other allotment acts, the Fork Belknap, Crow and Osage allotment acts, it was expressly stated that Congress retained the power to alter the allottee's expectancy in the minerals beneath his allotment. From this observation, the Court made the following presumption: "The rather conspicuous ommission of such language from a statute dealing with the same subject as (those other allotment acts) indicates that Congress intended to create rights in the Northern Cheyenne allottee different from those in the other allotment statutes." Appendix at A-6-7.

However, careful analysis of these other allotment acts reveals: 1) they are generically different from the 1926 Act—vastly more pervasive in their dismantlement of the system of tribal property and far more liberal in their relinquishment of the trust stewardship over tribal members and their allotments; 2) examinations of the legislative histories of the Crow and Osage acts reveal that the express provisos were not viewed by Congress as essential to the preservation of the inherent power to alter the allottee's expectancy in the minerals; and, 3) neither the Fort Belknap, Crow nor Osage acts contain the all-encompassing statements of reserved power found in sections 1 and 3 of the Northern Cheyenne act.

United States v. Rowell, 243 U.S. 464 (1917). This power is fundamental, inherent in Congress' role as guardian of Indian people, and not subject to relinquishment so long as that guardianship subsists. *United States v. Jackson*, *supra* at 190. That Congress need not specifically reserve an amendatory power in its statutory plans for the distribution of tribal property is clear from the following decisions of this Court. In each of them, an alteration of a statutory plan of distribution is sustained despite the lack of a specific reservation of a power to alter. *United States v. Jim*, 409 U.S. 80 (1972); *United States v. Jackson, supra; Brader v. James, supra; Sweet v. Schock, supra; Sizemore v. Brady*, 235 U.S. 441 (1914); *United States v. Bartlett*, 235 U.S. 72 (1914); *Gritts v. Fisher*, 224 U.S. 640 (1912); *Goat v. United States*, 224 U.S. 458 (1912); *Heckman v. United States*, 224 U.S. 413 (1912); *Lowe v. Fisher*, 223 U.S. 95 (1912); *Tiger v. Western Investment Company*, 221 U.S. 286 (1911); *Wallace v. Adams*, 204 U.S. 415 (1907).

Gritts v. Fisher is a particularly compelling case. In *Gritts*, children born after September 1, 1902 were expressly barred from a class of allottees, yet this Court sustained a 1906 amendment which expanded the class to include those previously-excluded children. Similarly, in a 1972 decision, *United States v. Jim, supra*, the language of an original allotment act strongly indicated that lands were to be permanently preserved for the benefit of the originally-specified class of allottees. Nevertheless, this Court upheld an amendment which significantly broadened this class of allottees.

6. The Decision Below Conflicts with Decisions of this Court Which Hold That an Allottee Does Not Acquire Vested Rights Until the Allotment is Actually Conveyed.

The expectancy involved in this case arose from the following language in the 1926 Act:

> [A]t the expiration of fifty years from the date of approval of this Act the coal or other minerals, including oil, gas, and other natural deposits of said allotments shall *become* the property of the respective allottees or their heirs. . . .

Appendix at A-40 (emphasis added).[24] The trust patents delivered pursuant to the act provided:

> There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.

Appendix at A-55. Manifestly, neither the Act nor the patent makes a present grant of the minerals; and, under the decisions of this Court, absent a present statutory grant or a completed allotment, no rights vest. *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920); *Mullen v. Pickens*, 250 U.S. 590 (1919); *United States v. Rowell*, 243 U.S. 464 (1917); *Woodward v. DeGraffenried*, 238 U.S. 284 (1915); *Sizemore v. Brady*, 235 U.S. 441 (1914).

For example, in *United States v. Rowell, supra*, Congress commanded allotment of a specifically-identified tract to a tribal member in the following terms:

That the Secretary of Interior is hereby authorized

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24. The court below reasoned: ". . . Congress by its unconditional, noncontingent grant of these deposits to the allottees, evidenced an intent to create rights to the minerals in their favor. Under the Fifth Amendment, these rights, belonging to the individual allottees incident to their ownership of the allotted lands, could not be divested absent compliance with due process of law or payment of compensation." Appendix at A-5.

and directed to issue a patent in fee for [that tract]. . . .

243 U.S. at 465. Prior to the issuance of the patent, Congress discovered that the tract was far more valuable than originally believed and thus repealed the allotment act. This Court held that no vested property rights were invaded, on the following analysis: 1) the terms of the act did not in themselves amount to a grant "*in praeasenti*" which passed title immediately;[25] and moreover, 2) the repeal occurred prior to delivery to the allottee of a patent conveying the lands:

> And if, before that direction [to issue a patent] was complied with, it was discovered that the [land's] situation and value were such that to allot or convey it to him would invest him with much more than a fair distributive share of the common property of the tribe, we think it was equally admissible for Congress to recall that direction in the interests of the tribe as a whole. At most that direction was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect.

243 U.S. at 468. *See also Levey v. Stockslager, Commissioner*, 129 U.S. 470 (1889).

Similarly, in *Sizemore v. Brady, supra*, persons entitled to allotment under the terms of an original allotment act asserted that subsequent amendment of that act which divested their expectancy was in violation of the Fifth Amendment. This Court denied that claim on the basis

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25. Certainly under this standard, the provision in the 1926 Act calling for a future transfer of the minerals could not be considered a grant *in praeasenti*. Moreover, while the act in *Rowell* "directed" allotment, the 1926 Act merely "authorized" allotment.

that the amendment was enacted before actual allotment was consummated:

> There was nothing in the [original allotment act] indicative of a purpose to make a grant *in praeasenti*. On the contrary it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.

235 U.S. at 449.

7. The Decision Below Conflicts With Decisions of This Court Concerning Rules of Construction for Indian Legislation.

a. *The Decision Below Applied the Rule of Construction Which Seeks the Indian Understanding—Yet This Rule Was Inapplicable.*

The court below clearly conceded that under the 1926 Northern Cheyenne allotment act "it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property, and thereby confers upon Congress the power to change the beneficiaries of such tribal lands." Appendix at A-7 (footnote omitted). This conclusion is, in fact, mandated by this Court's decision in *British-American Oil Producing Co. v. Board of Equalization*, 229 U.S. 159 (1936). In that case this Court construed a statute which authorized the Secretary of the Interior to allot lands on the Blackfeet Reservation but provided that minerals were

to be reserved to the tribe until Congress should provide otherwise. The Court held in part:

> The issue of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted.

299 U.S. at 164-65.

Despite this holding, the court below rejected the literal terms of the 1926 Act on the basis of the constructional rule that Indian treaties and legislation "are to be taken in accord with common understanding, not in their technical sense, but in the sense that an illiterate people would understand them." Appendix at A-7. In light of this constructional rule, the Ninth Circuit presumed from the terms of the 1926 Act alone that the Northern Cheyenne allottees in 1926 must have understood the allotment act as endowing them with a fixed right to minerals 50 years hence. Explicitly, the court held that "[i]t is this meaning of the statute that creates a right to minerals in favor of the allottees." Appendix at A-8.

However, the decisions of this Court establish that the above rule of construction is *not* to be indiscriminately applied to any situation involving Indians; it is *only* applicable to those congressional actions which involve *Indian consent*. For example, in *United States v. First National Bank*, 234 U.S. 245 (1914), the rule of construction which seeks the Indian understanding was held inapplicable to the interpretation of an Indian act which did not involve Indian consent:

> [T]he Government insists that to effect the legislative

> purpose the words must be interpreted as the Indians understood them, and cases from this court (*Jones v. Meehan*, 175 U.S. 1; *Starr v. Long Jim*, 227 U.S. 613) are cited to the effect that Indian treaties and acts to which the Indians must give consent before they become operative must be interpreted so as to conform to the understanding of the Indians as to the meaning of the terms used. The justice and propriety of this method of interpretation is obvious and essential to the protection of an unlettered race, dealing with those of better education and skill, themselves framing contracts which the Indians are induced to sign. But the legislation here in question is not in the nature of contract and contains no provision that makes it effectual only upon the consent of the Indians whose rights and privileges are to be affected.

234 U.S. at 259.

Thus, while the rule of construction which seeks the Indian understanding has been frequently applied by this Court to statutes based upon Indian consent[26] there is *no* basis for applying this constructional rule to the Northern Cheyenne Allotment Act—since this Act was not explicitly predicated upon the consent of the Northern Cheyennes[27].

b. *The Decision Below Misapplied the Rule of Construction That Statutes Enacted for the Benefit of Indians Are to Be Construed in Their Favor.*

The court below held that in construing the 1926 Act, all doubts should be resolved by favoring the allottees over the tribe. In support of this proposition, the Ninth Circuit

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26. *See, e.g., Carpenter v. Shaw*, 280 363 (1940); *Marlin v. Lewallen*, 276 U.S. 68 (1928); *Starr v. Long Jim*, 221 U.S. 613 (1913); and, *Choate v. Trapp, supra.*

27. The court below invoked the Indian understanding rule of construction on the basis of *Adams v. Osage Tribe of Indians*, 59 F.2d 653 (10th Cir. 1932) *cert. denied*, 287 U.S. 652. However, the legislative history of the allotment act involved in *Adams* discloses that this act, *unlike* the Northern Cheyenne allotment act, was predicated upon prior tribal approval. H.R. REP. NO. 4996, 59th Cong., 1st Sess. 4 (1906).

cited decisions of this Court[28] which dealt with state and federal attempts to tax allotments acquired by treaty or agreement. Within that particular context, this Court has held that the terms of applicable treaties, agreements, or statutes must be liberally construed in favor of the allottees[29].

However, it is improper to hold that the decisions above require that the allottees be preferred over the tribe in the case at hand. Unlike that line of cases relied upon by the Ninth Circuit, this case does not involve an attempt by a non-Indian party, the government, to profit from encroachment upon individual Indian property rights. Rather, it involves a conflict between two groups both of which contain Indians[30]. Therefore, since it is not possible to favor either side under the rule (without disfavoring the other), the rule is inapplicable. To employ this rule of construction as did the Ninth Circuit defies logic and is indefensible.

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28. *Squire v. Capoeman*, 351 U.S. 1 (1956); *Carpenter v. Shaw, supra; Choate v. Trapp, supra.*

29. The court below attempted to fit the case at hand into that line of decisions with the following artificial reasoning: "Nominally the dispute in this case is between the tribe on one side and the class of allottees, heirs, and devisees on the other. But the actual controversy involves not these parties, but appellants, some of whom are Indians, having rights to the minerals beneath their lands, and Congress which by the 1968 Act seeks to extinguish these claimed rights." Appendix at A-8, note 5.

30. However, the respondent class of allottees, heirs and devisees includes a substantial number of non-member Indians and whites. Accordingly, if any rule of preference is to be applied, it should be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906).

c. *The Decision Below Failed To—Yet Should Have—Applied the Rule of Construction Which Broadly Considers the Circumstances Surrounding the Enactment of Indian Legislation.*

The 1926 Northern Cheyenne allotment act was enacted at the request of the Northern Cheyenne people for their collective benefit. In determining the congressional intent behind this legislation, the court below should have considered the circumstances and needs of these Indian people and their object and expectations in soliciting this act. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). An inquiry into these considerations culminates with a most significant fact.

While established in 1884 and enlarged in 1900, the Northern Cheyenne Reservation received little congressional attention during the late 19th and early 20th centuries. While many other tribes during these years were objects of individualized congressional scrutiny and legislation (especially dealing with allotment), the Northern Cheyenne were essentially ignored by Congress.

However, by 1924 the Northern Cheyenne people had become painfully aware that they had not yet been granted an allotment act. Thus, in October of 1924 the tribe began a course of correspondence and discussion with members of the Montana congressional delegation in hopes of procuring an act of allotment. By December of 1924, Senator Thomas J. Walsh of Montana had learned that the Commissioner of Indian Affairs Charles H. Burke opposed the allotment of the Northern Cheyenne Reservation. In response, Walsh urged the tribe to provide him with materials which could be used to overcome Commissioner Burke's opposition.

This request brought forth an overwhelming response from the Northern Cheyenne people, an emphatic declaration of their hopes and expectations regarding allotment. A letter dated February 3, 1925, signed by tribal Chiefs and Headsman was sent to Senator Walsh. This letter began:

> We transmit herewith a petition signed by all the people belonging to this reservation that we were able to see in the short time allowed. In fact, we encountered no opposition whatever, and they were all in hearty accord with the allotment idea.

Appendix at A-49.

The petition to Walsh, in relevant part, read:

> We, the undersigned members of the Northern Cheyenne Indian Tribe of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.
>
> *To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.*

Appendix at A-53 (emphasis added).

Attached to the petition were 37 pages bearing the signatures, marks, and thumbprints of approximately 500 tribal members. Thus, in view of this petition, there can be no doubt that the Northern Cheyenne people desired that the ownership and control of all reservation minerals be retained by the tribe.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
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By STEVEN H. CHESTNUT
Attorneys for Petitioner

APPENDIX A

OPINIONS BELOW

Ninth Circuit Court of Appeals Opinion
(Reported at 505 F.2d 268)

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

MYRON L. LITTLEBIRD,
Appellant.

Nos. 73-1545 to 73-1547

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Oct. 17, 1974

Before WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

CHOY, Circuit Judge:

The Northern Cheyenne Tribe, at the direction of

*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

Congress, brought this action in the district court under a special grant of jurisdiction against appellants, individual owners, and class representatives of all allottees, their heirs and devisees, owning allotments of land within the tribal reservation. At stake are the rights to the mineral deposits contained in and beneath these lands. In 1968, Congress reserved these deposits in perpetuity for the benefit of the tribe, provided the tribe instituted this suit "to determine whether under the provisions of the Act of June 3, 1926 [44 Stat. 690], as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment." Act of July 24, 1968, 82 Stat. 424, 425. The district court held that no vested property rights were received and awarded judgment for the tribe, 349 F.Supp. 1302 (D.Mont. 1972). This appeal followed. We reverse.

The Act of June 3, 1926 as Amended

Pursuant to its then existing policy under the General Allotment Act of 1887, 24 Stat. 388, of ending the Indians' communal land holdings and substituting therefor the private ownership of the reservation lands, Congress in 1926 ordered the allotment of specific tracts of land in the Northern Cheyenne reservation in Montana. In the first section of the Northern Cheyenne Allotment Act (the Act), Congress declared the reservation lands to be the property of the Northern Cheyenne Indians, "subject to such control and management of said property as the Congress of the United States may direct." 44 Stat. at 690. Section 2 authorized the Secretary of the Interior to prepare a complete roll of these Indians along with a list of lands suitable for agriculture

and grazing. A tract not exceeding 160 acres of such land was then to be alloted in severalty to each of the duly enrolled Indians for whom the reservation was set apart, and a trust patent issued for this land. Classified as a homestead of the individual allottee, the land was to be held in trust for him by the United States, and was to remain inalienable and nontaxable for a period of twenty-five years from the issuance of the patent, or until the death of the allottee.

In the part of the Act which is most critical here, Congress reserved the land's timber and mineral deposits for the benefit of the tribe for a period of years. Section 3 states:

> "That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unalloted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 44 Stat. at 691.

After several other changes in the Act,[1] on July 24,

1. Under the Act of July 24, 1947, the timber on the allotted land was declared to be the property of the allottees. 61 Stat. 418. In 1961, Act of September 22, 1961, 75 Stat. 586, the Act was amended so that at the expiration of the fifty year period the minerals "shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overyling such minerals, oil, gas, or other natural deposits . . ." Further, title to the minerals was to be "held by the United States in trust for the Indian owners, except that if by the expiration of said fifty years the entire Indian interests in the minerals

1968, Congress enacted P.L. 90-424, 82 Stat. 424, which amended Section 3 of the Act to read as follows:

> "(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes . . . under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> (b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Thus, as a result of the 1968 amendment, the mineral deposits which under the Act were to become the allottees' property in 1976, were instead declared to be the property of the tribe in perpetuity. The question presented is whether the allottees received rights to the minerals through the Act which are constitutionally protected against impairment by the 1968 amendment. The answer to this question in turn depends upon the intent of Congress in 1926 when it reserved the minerals for fifty years, but provided that thereafter they would become the property of the allottees.

The district court held that Congress had reserved to itself sufficient powers (1) to preclude any vesting of rights in the allottees and (2) to preserve its right to extend in perpetuity the trust period of the mineral estate.

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within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent."

The court reasoned that the allottees received no rights in the minerals when Congress reserved them for the tribe; that this reservation severed them from the allotted lands, creating two separate estates, one surface and one mineral, with only the surface estate passing to the allottees, while the minerals became part of the unallotted tribal lands. Since Congress, in section 3 of the Act, had explicitly reserved the power to manage and control such unallotted land, the court concluded that the reallocation of the minerals to the tribe was but a valid exercise of this power. In addition, the court found that Congress's more broadly stated power in section 1, of management and control over the reservation lands, indicated that it intended to retain its plenary authority over the mineral rights. Finally, the court concluded that the language in section 3, referring to the minerals which "shall become the property of the individual allottees," when compared with other language stating that the land "is hereby, declared to be the property" of the allottees, showed that Congress created only an inchoate or prospective right to the minerals, rather than a present vested one. 349 F.Supp. at 1308-1309.

We believe the district court erred when it considered the mineral deposits as unallotted tribal land subject to reappropriation, when Congress, by its unconditional, noncontingent grant of these deposits to the allottees, evidenced an intent to create rights to the minerals in their favor. Under the Fifth Amendment, these rights, belonging to the individual allottees incident to their ownership of the allotted lands, could not be divested absent compliance with due process of law or payment of compensation.

Reserving Mineral Deposits

It had been Congress's policy in several other allotment statutes, where the lands contained potentially valuable mineral resources, to allot the surface estate while reserving for the tribe for a period of years the minerals beneath these lands. *E.g.*, Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap Indians); Act of June 4, 1920, 41 Stat. 751 (Crow Indians); Act of June 28, 1906, 34 Stat. 539 (Osage Indians). In each of these prior acts, however, the future interest of the allottees at the expiration of the term fixed was clearly made contingent upon Congress not acting to the contrary.[2] Thus, where Congress had retained the power to extend the period of the Osage Indians' tribal ownership, it has been held that the allottees could not prevent this extension based on a claim that they had received vested rights to those minerals. Adams v. Osage Tribe of Indians, 59 F.2d 653 (10th Cir. 1932); *see* Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931).

The 1926 Act on the other hand contains no language qualifying or conditioning the allottees' remainder interest in the mineral deposits. The rather conspicious omission of such language from a statute dealing with the same subject as the previous legislation, indicates that

2. The mineral deposits in the allotted lands of the Fort Belknap Indians were reserved for the tribe for fifty years, thereafter to become the property of the individual allottee or his heir, "but the right [was] reserved to Congress to extend the period within which such reserved tribal rights shall expire." 41 Stat. at 1359. The reservation for the Crow Indian tribe similarly provided that "unless otherwise ordered by Congress" these mineral deposits "shall become the property of the individual allottee or his heirs . . ." 41 Stat. at 753. And, in the case of the Osage Indians, the future mineral rights were awarded to the allottees "unless otherwise provided for by Act of Congress." 34 Stat. at 542; see also Act of June 30, 1919, 41 Stat. 3, 17, where the mineral deposits were "reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct. . . ."

Congress intended to create rights in the Northern Cheyenne allottees different from those in the other allotment statutes.

Although we reach the opposite result here from that in *Adams, supra,* the rationales for both cases are entirely consistent. In construing the language of the Osage Allotment Act, 34 Stat. 539, as amended, the court in *Adams* followed the

> "established rule that treaties and legislative acts that deal with Indians and their affairs are to be taken in accord with common understanding, not in their technical sense, but in the sense that an illiterate people would understand them."

59 F.2d at 654. The court found that language "simple and plain, and its meaning clear to common understanding." *Id.* at 655. The provision granting the minerals "unless otherwise provided for by Act of Congress" clearly reserves in Congress the power to alter, extend or otherwise modify the allottees' interest.

There is no such clear expression of Congress's retained power in this case. While it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property,[3] and thereby confers upon Congress the power

3. British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164-165, 57 S.Ct. 132, 81 L.Ed. 95 (1936). In this case, the Court held that Congress may consent to state taxation levied on the production of oil under tribal lands. The statute involved was that reserving the mineral deposits on the Blackfeet Indian reservation (see note 2 *supra*), Act of June 30, 1919, 41 Stat. 3, 16, 17, for the tribe "until Congress shall otherwise direct." Thus, the case concerned only tribal rights in the mineral deposits. To the extent that the Court determined that a mineral reservation severs this estate and makes it unallotted land, we believe that the facts here, which pertain to individual property rights, are distinguishable and we therefore are not bound by this language.

to change the beneficiaries of such tribal lands,[4] the ultimate result of such analysis would be Congress' achieving through the back door what it had never specifically claimed when it went through the front. Viewing the reservation for the tribe not in this technical sense but in the way the Indians would understand it, the minerals were never declared to be a part of the unallotted lands. In the plain words of the statute, the minerals were simply reserved, or set aside, for the benefit of the tribe for a fixed term of fifty years, thereafter to become the property of the allottees, with no conditions attached to their receipt of these minerals. It is this meaning of the statute that creates a right to the minerals in favor of the allottees. Under *Adams* it should be controlling. Where either of two interpretations of the language used by Congress is possible, one having a technical meaning and the other as naturally understood by the Indians, the natural meaning of the words must prevail, since statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor.[5] Squire v. Capoeman, 351 U.S. 1, 6-7, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Choate v. Trapp, 224

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4. *See* United States v. Jim, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972).

5. Nominally the dispute in this case is between the tribe on one side and the class of allottees, heirs and devisees on the other. But the actual controversy involves not these parties, but appellants, some of whom are Indians, claiming rights in the minerals beneath their lands, and Congress which by the 1968 Act seeks to extinguish these claimed rights. As the district court stated: "If the [appellants] lose what they claim they are entitled to under the Northern Cheyenne Allotment Act it will be because Congress has so directed. If they prevail, it will be because that direction was beyond Congress' congressional power to impose." 349 F.Supp. at 1307 n. 17.

U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912); Stevens v. C. I. R., 452 F.2d 741, 744 (9th Cir. 1971); Arenas v. Preston, 181 F.2d 62, 66 (9th Cir. 1950).

The Allottees' Rights in Allotted—Versus Unallotted—Lands

The power reserved by Congress in section 1 of the 1926 Act, over the reservation lands, cannot be the basis for any extinguishment of the allottees' rights in their allotted lands. "Reservation land is divided into two classes: land allotted to individual Indians for the use and benefit of the allottee; and common tribal land used for the benefit of the entire community. . . ." C. I. R. v. Walker, 326 F.2d 261, 262 (9th Cir. 1964). There is a broad distinction between such tribal property held in common and the private property held by the individual allottee. Choate v. Trapp, *supra*, 224 U.S. at 671, 32 S.Ct. 565. *See* United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 353-354 (10th Cir. 1942).

It is undoubted that as regards tribal property Congress maintains plenary authority to make such changes in the management and disposition thereof as it deems necessary in order to promote the welfare of the Indians. Morrison v. Work, 266 U.S. 481, 485, 45 S.Ct. 149, 69 L.Ed. 394 (1925); Gritts v. Fisher, 224 U.S. 640, 648, 32 S.Ct. 580, 56 L.Ed. 928 (1912); *see* United States v. Jim, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972). And, so long as the land remains tribal in character the individual Indian has no vested right, as against the tribe, to any specific part of the tribal property. Gritts v. Fisher, *supra*, St. Marie v. United States, 108 F.2d 876 (9th Cir. 1940).

See generally, F. Cohen, Handbook of Federal Indian Law 183 (1940).

Once the reservation land is allotted, in severalty and a trust patent issued, however, though legal title is retained by the United States, the allottee acquires an equitable interest in the property, which except for the restriction on alienation, gives him the virtual fee in the land. United States v. Paine Lumber Co., 206 U.S. 467, 473, 27 S.Ct. 697, 51 L.Ed. 1139 (1907); Arenas v. Preston, *supra,* 181 F.2d at 64; United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940); Eastman v. United States, 28 F.Supp. 807, 808 (W.D.Wash. 1939). The Supreme Court considered the nature of the allottees' interest in Choate v. Trapp, *supra,* where Congress had allotted lands to the Choctaw and Chickasaw Indians. The lands were declared to be non-taxable for a period of twenty-five years. Some ten years later, Congress enacted further legislation which permitted state taxation of these unrestricted lands. The Court held

> "[T]he provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. . . .
>
> ". . . Under the provisions of the 5th Amendment there was no more power to deprive [the allottee] of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land.
>
> After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued." 224 U.S. at 673-674, 32 S.Ct. at 569.

Similarly, here, the Northern Cheyenne Indians received a vested right to the minerals incident to their allotments. Congress was without power subsequently to divest them of that right. That Congress realized it may have exceeded even its own plenary power to deal with tribal property (United States v. Jim, et al, *supra*) in enacting the amendment of July 28, 1968, here in issue (p. 269, *supra*) is evidenced by the unusual nature of the enactment itself. The 1968 amendment to the 1926 Allotment Act, attempting to reserve the mineral deposits to the tribe in perpetuity, is wholly provisional, and explicitly leaves the validity of the enactment entirely up to the court.[6]

The judgment permitting such divestiture is reversed and remanded to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

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6. The statute reads in pertinent part: If the court determines that the allottees, their heirs or devisees, have received a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 22, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act. Act of July 24, 1968, 82 Stat. 424, 425.

District Court Opinion (Reported at 349 F.Supp 1302)

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST *et al.*,
Defendants.

Civ. No. 883

UNITED STATES DISTRICT COURT,
D. MONTANA, BILLINGS DIVISION

Sept. 29, 1972

Rehearing Denied Nov. 28, 1972

ORDER AND OPINION

JAMESON, District Judge.

This is a class action brought pursuant to Public Law 90-424, approved July 24, 1968 (82 Stat. 424), which amended section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Acts of July 24, 1947 (61 Stat. 418) and September 22, 1961 (75 Stat. 586), to reserve in perpetuity the minerals underlying the Northern Cheyenne reservation for the benefit of the plaintiff Tribe.

Under prior acts the minerals would have become the property of the allottees, their heirs and devisees, in 1976, Section 3 of the Act of June 3, 1926 providing:

> "Sec. 3. That the timber, coal, or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 44 Stat. 690, 691.

Public Law 90-424 amends Section 3 of the Act of June 3, 1926, as amended, to read:

> "Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> "(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 82 Stat. 244, 425.

The Northern Cheyenne Tribe was authorized by Section 2 of Public Law 90-424 to commence this action "against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment."[1]

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1. This section provided further that the United States District Court for the District of Montana shall have jurisdiction to hear and determine the action, with a right of appeal, and that if the court determines that the allottees, their heirs and devisees have a vested interest in the minerals protected by the fifth amendment, or if the Tribe does not commence an action within two years, the provisions of section 3 of the Act of June 3, 1926, as amended, shall "be carried out as fully as if section 3 had not been amended by this Act."

Pursuant to this Act and Rule 23, F.R.Civ.P.[2] the Northern Cheyenne Tribe[3] commenced this action on July 2, 1970, within two years of the effective date of the Act, against ten named defendants,[4] individually and as representatives of all allottees, their heirs or devisees who received allotments pursuant to the Act of June 3, 1926, as amended,[5] seeking judgment that the allottees do not have a vested right in the minerals underlying the reservation and that the minerals are reserved in perpetuity for the benefit of the Tribe.

Ten of the named defendants are members of the plaintiff Tribe[6] and are represented by Messrs. Brueggemann and Porter, who also represent nine additional defendants who are members of the Tribe. Another member of the Tribe who was not a named defendant is represented by the United States Attorney for the District of Montana. Two of the named defendants are not members of the Tribe. One of these defendants, Elva L. Littlechief Wil-

2. While the complaint does not specifically allege that it is brought pursuant to Rule 23, it does contain allegations clearly designed to bring it within that rule.

3. The Tribe is a federal corporation chartered under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

4. By amended complaint filed September 8, 1970 two additional persons were named as defendants, both individually and as representatives of heirs and devisees who are nonmembers of the Northern Cheyenne Tribe.

5. It is alleged, *inter alia*, that the allottees, their heirs and devisees number 1,489 persons located in various places throughout the United States and are so numerous as to make it impracticable to bring them all before the court; that there are questions of law or fact which are common to the entire class; and that the named defendants will fairly and adequately protect the interests of the class.

6. The ten reside in various parts of the Northern Cheyenne Reservation. Two were named from each of the five political districts for electoral purposes.

liamson, is represented by the Montana Legal Services and its Big Horn and Rosebud County branch, who also represent James Bowen.[7]

Numerous motions and briefs have been filed by counsel for the respective parties, as set out more fully in memorandum opinions of September 30, 1971, and January 12, 1972. All motions were denied in orders entered September 30, 1971 and January 10, 1972.

In the memorandum opinion of September 30, 1971 it was held that (1) this court has jurisdiction; (2) the United States is not an indispensable party defendant; (3) the United States should not be joined as an involuntary party plaintiff; and (4) this is a proper class action. In the January 12, 1972 opinion it was held further that (5) the notice served upon the defendants was sufficient; (6) no further notice or questionnaire was required; and (7) all defendants, both members and nonmembers of the Northern Cheyenne Tribe who would be affected by the judgment in this case, are adequately represented by counsel.[8]

The court adheres to all of these conclusions.[9]

7. Williamson is an enrolled member of the Eastern Shawnee Indian Tribe. The other named defendant who is not a member of the plaintiff Tribe, Delores Walters Murdock, is a member of the Crow Tribe. Bowen is a non-Indian who inherited from an allottee.

8. It was recognized that in a class action the interests of the representative parties must be typical of those of the entire class; the action must be vigorously prosecuted by the representative parties and their counsel; counsel must be competent to conduct the litigation; and it is necessary to eliminate as far as possible the likelihood that the litigants are involved in a collusive suit or that the representative parties have interests antagonistic to those of the remainder of the class or subclass. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-563 (2 Cir. 1968).

9. All of these questions were discussed fully in the opinions of September 30, 1971 and January 12, 1972.

In a pretrial order entered July 10, 1972 the parties agreed to submit the following legal issues for determination prior to trial:[10]

> "1. Whether or not the defendants and their predecessors in interest received a vested property right in the minerals in and under their respective allotments which is protected by the Fifth Amendment of the United States Constitution by virtue of the Act of June 3, 1926 (44 Stat. 690) as amended;
>
> "2. Whether or not the defendant class is entitled to the revenues received by the plaintiff by virtue of the execution of leases and permits covering the minerals in and under their respective allotments;[11]
>
> "3. Whether or not the plaintiff is liable to the defendants for damages done to the surface of their respective allotments by the permittees and lessees of the plaintiff in exploring for mineral deposits in and under said allotments;[12]
>
> "4. Whether or not the defendants are entitled to an injunction to enjoin the plaintiff and its permittees and lessees from going upon their respective allotments for the purpose of exploring for mineral deposits."

Acquisition of Reservation Lands

The lands comprising the Northern Cheyenne Reservation were originally part of the Crow country recog-

10. It was stipulated that this submission was made without waiver by the defendants of any of the defenses asserted in pre-trial motions or waiver by plaintiff of its right to contest the jurisdiction of the court over the counterclaims of the defendants.

11. The parties have stipulated that the plaintiff in the past has entered into oil and gas leases, coal permits and coal leases and has received sums of money therefor, the exact amount of which is not presently available to the parties.

12. The parties have stipulated further that the plaintiff's lessees and permittees have explored for mineral deposits and in the exploratory operations have distrubed the surface of the ground and have removed certain samples of the soil and mineral deposits; that there has been no production of oil and gas or coal from the lands.

nized by the Treaty of September 17, 1851, 11 Stat. 749. 2 Kappler, Indian Affairs, Laws and Treaties, 594. When the Crow Reservation was created by the Treaty of May 7, 1868, 15 Stat. 649, the "Crow Nation ceded all its right and title in other lands embraced within the treaty area to the United States." United States v. Northern Pacific Ry. Co., 311 U.S. 317, 354, 61 S.Ct. 264, 281, 85 L.Ed. 210 (1940). The United States thereupon became the owner of these lands.

The Northern Cheyenne Reservation was created by an executive order issued by President Arthur on November 26, 1884 which directed that the land be "withheld from sale and settlement, and set apart for the use and occupation of the Northern Cheyenne Indians, ° ° ° and such other Indians as the Secretary of the Interior may see fit to locate thereon ° ° °." 1 Kappler, *supra*, 860. The boundaries of the reservation were enlarged by an executive order of President McKinley on March 19, 1900, the tract of land therein described being "withdrawn from sale and settlment and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, ° ° °." 1 Kappler, *supar*, 860.[13]

Act of June 3, 1926

The executive order of March 19, 1900 was confirmed

13. I find no merit in defendants' contention that the Northern Cheyenne Indians acquired a vested interest in these lands under the Northern Cheyenne and Northern Arapaho Treaty of May 10, 1868, 15 Stat. 655. While the Northern Cheyenne Indians agreed to accept land to be set apart as a permanent reservation and relinquished their rights to all other lands, the reservation lands now occupied by the Northern Cheyenne Tribe were not described in that treaty and the members of the Tribe acquired no vested interest under that treaty in either the surface or minerals.

by Congress June 3, 1926 in the enactment of the Northern Cheyenne Allotment Act (44 Stat. 690). Section 1 declares the lands "to be the property of [the Northern Cheyenne] Indians, subject to such control and management of said property as the Congress of the United States may direct." Section 2 provides for the allotment of agricultural and grazing lands not exceeding 160 acres to each of the duly enrolled Indians "now living, for whom said reservation was set apart. * * *."

Section 3 provides that the timber, coal or other minerals "are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe." This is followed by two provisions critical to a determination of this case: (1) that at the expiration of fifty years the coal or other minerals "shall become the property of the respective allottees or their heirs," and (2) that the unalloted lands "shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Congressional Policies Re: Indian Lands

The question of whether under these provisions of the Act of June 3, 1926, as amended,[14] the allottees, their

14. Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586). Under the 1947 amendment timber was "hereby declared to be the property of the allottees." The 1961 amendment provided that upon the expiration of the fifty year period the minerals "shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas, or other natural deposits * * *." The Amendment provided further that

heirs or devisees, "have received a vested property right protected by the fifth amendment" must be considered in the light of well established national policies with respect to Indians and Indian property.

a. Plenary Power of Congress

[1] First, it is clear that Congress has plenary power to deal with Indian affairs and property.[15] It is true, as defendants contend, that the "power to control and manage" is not absolute. The United States, may not, for example, give tribal lands to others or appropriate them for its own purposes without just compensation.[16] Here, however, we are not concerned with the taking of Indian property for others, but with a controversy between the Tribe and members and nonmembers of the Tribe who own allotted lands. This controversy must be resolved by determining the intent of Congress in the Act of June 3, 1926 and the

title to the minerals was to be "held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent."

15. U.S. Const., Art. I, § 8, cl. 3; Worcester v. State of Georgia, 31 U.S. 515, 561 (6 Pet. 515), 8 L.Ed. 483 (1832); United States v. Kagama, 118 U.S. 375, 385, 6 S.Ct. 1109, 30 L.Ed. 228 (1885); Perrin v. United States, 232 U.S. 478, 486, 34 S.Ct. 387, 58 L.Ed. 691 (1914); Department of Interior, Federal Indian Law, 21, 38 (Cohen 1958 Rev.).

16. United States v. Alcea Band of Tillimooks, 329 U.S. 40, 54, 67 S.Ct. 167, 91 L.Ed. 29 (1946), citing Stephens v. Cherokee Nation, 174 U.S. 445, 478, 19 S.Ct. 722, 43 L.Ed. 1041 (1899); and United States v. Creek Nation, 295 U.S. 103, 110, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). See also United States v. Shoshone Tribe, 304 U.S. 111, 115, 58 S. Ct. 794, 82 L.Ed. 1213 (1938).

power of Congress in the Act of July 14, 1968.[17]

In dealing with "tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare."[18] In determining "what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted . . . by the courts."[19]

b. Reservation of Mineral Estates

Second, it had been the policy of Congress for several years prior to the enactment of the Northern Cheyenne Allotment Act in 1926 to sever mineral estates from surface estates on many Indian reservations, the severed, but undivided and unallotted, mineral estates being held in trust for the tribe for a term of years. This policy was usually expressed, as here, by the Allotment Acts "reserving" the minerals for the benefit of the tribe for a term of years and a provision that at the expiration of the term the minerals would "become the property" of the allottees

17. As stated in the Memorandum Opinion of September 30, 1971, at 10: "Here, the United States has a duty to hold and protect the mineral rights in question. The sole issue is whether it is to hold them for the plaintiff tribe or the defendant allottees, their heirs and devisees. If the defendants lose what they claim they are entitled to under the Northern Cheyenne Allotment Act it will be because Congress has so directed. If they prevail, it will be because that direction was beyond Congress's constitutional power to impose."

18. Morrison v. Work, 266 U.S. 481, 485, 45 S.Ct. 149, 151, 69 L.Ed. 394 (1925): See also Gritts v. Fisher, 224, U.S. 640, 642, 32 S.Ct. 580, 56 L.Ed. 928 (1912); Department of Interior, Federal Indian Law, *supra*, at 34.

19. Perrin v. United States, *supra*, note 15 at 486, 34 S.Ct. at 390. See also United States v. Thomas, 151 U.S. 577, 585, 14 S.Ct. 426, 38 L.Ed. 276 (1894).

of the lands.[20] In some cases Congress subsequently acted to extend the term the mineral estate was to be held in trust for the tribe.[21]

The power of Congress to extend a period of reservation of mineral rights was recognized in Adams v. Osage Tribe of Indians, 59 F.2d 653, 657 (10 Cir. 1932) cert. denied 287 U.S. 652, 53 S.Ct. 116, 77 L.Ed. 563, the case upon which plaintiff places primary reliance. There the Court held that statutes enacted in 1921 and 1929[22] extending a twenty-five year period of reservation of mineral rights in the Osage Tribe under the Act of June 28, 1906 (34 Stat. 539) were within the power of Congress and not violative of due process. It recognized that the reservation was sufficient to divide allotments into two estates, surface and mineral, and held that the allottees did not take vested etsates in remainder in the minerals on issuance of deeds to their allotment of the surface. The Court concluded: "And so we say the reservation in the Allotment Act and the Acts of March 3, 1921, and March 2, 1929, were 'but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it

20. For example, Act of June 28, 1906, § 3 (34 Stat. 539) (Osage Indian Reservation, 25 year reservation); Act of June 30, 1919, § 10 (41 Stat. 3, 17) (Blackfeet Indian Reservation, "until Congress shall otherwise direct" reservation); Act of June 4, 1920, § 6 (41 Stat. 751) (Crow Indian Reservation, 50 year reservation); Act of March 3, 1921, §§ 4 and 6 (41 Stat. 1355) (Fort Belknap Reservation, 50 year reservation). See generally, Department of Interior, Federal Indian Law, *supra*, at 649-652.

21. For example, Act of June 28, 1906 (34 Stat. 539), as amended by the Act of March 3, 1921 (41 Stat. 1249), and the Act of March 2, 1929 (45 Stat. 1478) (Osage Indians).

22. Act of March 3, 1921 (41 Stat. 1249) and Act of March 2, 1929 (45 Stat. 1478).

was carried into effect and while the tribal relations continued.'" 59 F.2d at 657, quoting Gritts v. Fisher, *supra*, note 18, 224 U.S. at 648, 32 S. Ct. 580, 583.[23]

Contentions of the Parties

Recognizing the wide discretion of Congress in exercising it plenary power over Indian lands and the general policy of reserving minerals, the defendants contend that Adams v. Osage Tribe of Indians, *supra*, is distinguishable and that the Act of June 3, 1926, unlike other and comparable acts, contains no express reservation of power in Congress to modify, extend or extinguish the interest of the surface allottees in the mineral estate. They argue that Congress manifested a clear intent in the 1926 Act to vest title to the minerals, and was powerless to change or modify that vested interest in 1968.

On the other hand, plaintiff argues that while the Act of June 3, 1926 does not contain the precise language of the Osage and other reservations, it does contain a comparable, and perhaps wider, reserved power in Congress.

Is Adams v. Osage Tribe of Indians Distinguishable?

The Osage Allotment Act of June 28, 1906, Section 2,

23. See also Taylor v. Tayrien, 51 F.2d 884, 887 (10 Cir. 1931) cert. denied 284 U.S. 672, 52 S.Ct. 127, 76 L.Ed. 569, where the court held that the Osage Act of 1906 "made no allotment of the mineral estate in the land; it remained tribal property." The court said further at 890: 'The idea in reserving the minerals to the tribe was doubtless a double one; it tended to equalize the allotments to the individuals, and it preserved intact a source to which the Indian who had squandered his allotment, might look for sustenance. In 1906 it was thought that the Osages would be ready for complete emancipation by 1931; as that year drew near, it was seen that he was not yet ready to hold his own; the period has been twice extended for his protection."

Paragraph 7, (34 Stat. 539), *inter alia*, granted allotments in surface land and provided:

> "That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said lands at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

Further, the Act provided at Section 3:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years ° ° °."

And at Section 5:

> "That at the expiration of the period of twenty-five years ° ° ° the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage Tribe ° ° ° or their heirs, as herein provided ° ° °."

The Northern Cheyenne Allotment Act of June 3, 1926 does not include the phrase "unless otherwise provided by Congress" following the reservation of the mineral estate to the Tribe. Section 1 of the Act does provide, however, that the Northern Cheyenne Reservation "is hereby, declared to be the property of said (Northern Cheyenne) Indians, subject to such control and management of said property as the Congress of the United States may direct."[24] Since the reserved mineral estate is a part of the reservation land, it is also subject to this reserved power of Congress to manage and control, negating a congressional intent to vest mineral rights in individual allottees.

24. This express and broad reservation of power over all reservation land in the first section of the Northern Cheyenne Allotment Act is absent in other Allotment Acts cited *supra*.

Section 3 of the June 3, 1926 Act provides for the leasing of minerals during the fifty year trust period, that the minerals shall become the property of the individual allottees upon the expiration of the fifty year trust period, and that "the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." A mineral estate "is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted." British-American Oil Producing Co. v. Board of Equalization of State of Montana, 299 U.S. 159, 164-165, 57 S. Ct. 132, 134, 81 L.Ed. 95 (1936).[25] Thus, Congress' reserved power to manage and control unallotted land precluded any vesting of rights in the allottees, and preserved the power to extend in perpetuity the trust period of the mineral estate.

I conclude that by reason of the general provision in Section 1 of the Act of June 3, 1926 that the property of the Northern Cheyenne Reservation is "subject to such control and management" as Congress may direct, reinforced by a similar provision in Section 3, Adams v. Osage Tribe of Indians, *supra*, is indistinguishable and should be followed here.

No Vested Mineral Interest Granted to Surface Allottees

In addition to the reserved power in Congress, the language of the Act of June 3, 1926 also indicates that no present mineral interest was granted to the surface allottees. The Act provides that the minerals shall "become"

25. See also United States v. Bruisedhead, 248 F.Supp. 999, 1001 (D. Mont. 1966).

the property of the allottees "at the expiration of fifty years."

In contrast, when Congress acted in Section 1 to convey a present interest to the Tribe it provided that the Northern Cheyenne Reservation "is hereby, declared to be the property" of the Northern Cheyenne Indians. And again, by amendment in the Act of July 24, 1947, (61 Stat. 418) Congress provided that timber on surface allotments is "hereby declared to be the property of the allottees * * *."

The court in finding no vested mineral rights in the Osage allottees characterized their interest as an "inchoate right" to receive a share of the net returns, "subject to the will of Congress." Taylor v. Tayrien, *supra*, at 887. See also Adams v. Osage Tribe of Indians, *supra*. Cohen describes an individual's right in tribal property as a "prospective right"[26] and defines it as "an intangible right to share" in tribal property. Department of Interior, Federal Indian Law, *supra*, at 748.

I conclude that, consistent with Congressional policy and comparable allotment acts reserving minerals to a tribe, the Northern Cheyenne Allotment Act of June 3, 1926 also reserves sufficient power in the Congress to reserve the Northern Cheyenne mineral estate "in perpetuity

26. Defendants argue that the interest of the allottees, their heirs and devisees, is "equivalent to a future interest, presently vesting." Plaintiff terms the interest a "mere expectancy." Because of the unique guardian/ward relationship between the United States and Indians, and the trust character of tribal property, use of standard property descriptions—mere expectancy, future interest, remainders, conditions precedent and subsequent—are of little assistance.

for the benefit of the tribe",[27] and that the allottees, their heirs and devisees, received no "vested property right in the minerals which is protected by the fifth amendment." The reserved mineral estate is unallotted tribal land subject to the control and management of Congress under Sections 1 and 3 of the Northern Cheyenne Allotment Act of June 3, 1926 (44 Stat. 690), as amended.[28]

This conclusion in effect disposes of the remaining issues of law submitted for determination prior to trial. No useful purpose would be served by a detailed discussion of these issue.[29]

Clearly, if the defendants acquired no vested interest in the minerals under the Act of June 3, 1926, as amended, they acquired no right to the revenues received by the plaintiff by virtue of the execution of leases and permits

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27. It is unnecessary to determine the exact nature or character of the Tribe's interest in the reserved mineral estate. See Department of Interior, Federal Indian Law, *supra*, at 583.

28. This conclusion is strengthened by the language in the patents issued to individual allottees. All trust patents issued pursuant to both the original Act of June 3, 1926 and the subsequent amendments, alloting lands as homesteads, "subject to all the provisions, conditions, limitations, and restrictions contained in (the) Act of June 3, 1926", contain this express reservation: "There is also reserved, for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas and all natural deposits in said land." At least part of the fee patents contain this reservation: "There is reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas and all natural deposits in said land, in accordance with the provisions of the Act of June 3, 1926 (44 Stat. 690)."
Clearly the trust patents provide no basis for any allottee's reliance on a present vested interest or even the promise of a future interest in the minerals. While the statute rather than the form of patent is controlling, the patent does manifest an interpretation of the statute by the Department of the Interior consistent with the conclusions herein stated.

29. They were fully considered in the memorandum opinion of September 30, 1971 in denying motions for a temporary restraining order and preliminary injunction.

covering the minerals under their respective surface allotments. Even if they had acquired a vested interest in the minerals, under the clear provisions of the 1926 Act, as amended, they would not be entitled to the proceeds from any lease or sale prior to the expiration of the fifty year period.

Section 4 of the Act of June 3, 1926 expressly provides that "all the income of said tribe from rents, royalties, or other profits accruing from the sale of any * * * coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, * * * shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct." The plain meaning of this language establishes an intent on the part of Congress that all proceeds from the lease or sale of mineral rights inure to the collective benefit of the Northern Cheyenne Indians during the fifty year period.[30]

Defendants also seek damages and an injunction prohibiting exploration, drilling and development of the minerals on surface allotments. The owners of a mineral estate or its lessee can enter and use the surface for exploration, recovery and development of the minerals, as is reasonably necessary. Hurley v. N. P. Ry. Co., 153 Mont. 199, 202, 455 P.2d 321 (1969). Defendant is entitled to

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30. At the date of the enactment of the Allotment Act the Northern Cheyenne Tribe was not a legal entity distinct from its members. As noted *supra*, note 3, subsequently the Tribe was incorporated under the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). Some persons who were not members of the Tribe became entitled to alloted lands through descent and distribution. The revised language contained in the 1961 amendment to section 3 reflects these changes.

neither damages nor an injunction for the activities of the Tribe and its lessees in exploring, drilling, and developing their mineral estate.[31]

Counsel for all parties have submitted comprehensive and well prepared briefs, which have been very helpful to the court

Pursuant to Rule 14(b) of the local rules of court, plaintiff will prepare and file a draft of judgment in accordance with this opinion and serve a copy upon each other party.

On Motions for New Trial or to Amend Judgment

Counsel for all of the named defendants have filed motions for a new trial or to amend the judgment. Prior to entry of September 29, 1972, the court considered all of the statutes, treaties, executive orders, and cases cited in support of the motions and ruled against defendants' contentions.

Nothing has been presented to persuade the court to modify its conclusions. On the contrary, the court finds support in the per curiam opinion of the United States Supreme Court in United States v. Jim, and Utah v. Jim, ... U.S. ....., 93 S.Ct. 261, 34 L.Ed.2d 282, decided November 20, 1972. The Court held that a 1933 statute

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31. Any disturbance of the surface has resulted from exploratory operations. There has been no production from any of the lands. See note 12, *supra*. In its brief filed July 14, 1972 plaintiff recognizes the right of the surface estate, saying in part: "While it is quite clear that the plaintiff, its permittees and licensees, are entitled to go upon for the purpose of exploration, the plaintiff does not assert that its permittees and licensees have a right to go on and strip mine, which would in essence destroy the surface estate of the defendants. The plaintiff recognizes that its licensees or permittees have no right to destroy the surface estate without compensating the individual defendants."

(47 Stat. 1418) conferring oil and gas royalties on Indians residing on the Anteh extension of the Navajo Reservation "did not create constitutionally protected property rights" in the beneficiaries of the Act and upheld a 1968 Act (82 Stat. 121) enlarging he class of beneficiaries to include the entire Navajo tribe residing in San Juan County, Utah.

Defendants Williamson and Bowen, noting the similarity between the 1933 statutory grant to the residents of the Anteh extension and the 1926 Act upon which the defendants here rely, urged this court to follow the opinion of the Utah District Court (unreported) holding that the 1933 Act vested property rights in the Anteh extension residents and that the 1968 Act was unconstitutional.

The Supreme Court reversed. following Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912), the Court concluded:

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the ° ° ° royalties ° ° ° in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Anteh extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation."

The motions for a new trial or to amend the judgment are denied.

APPENDIX B

JUDGMENTS AND ORDERS BELOW

Ninth Circuit Court of Appeals Order Denying Petition for Rehearing—Entered April 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
MYRON L. LITTLEBIRD,
Defendant-Appellant.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

The panel as constituted in the above cases has voted to deny the petition for rehearing. The petition for rehearing is denied.

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*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

Ninth Circuit Court of Appeals Order Granting Leave to File Petition for Rehearing—Entered February 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,
v.
MYRON L. LITTLEBIRD,
Defendant-Appellant.

ORDER

Before: WRIGHT and CHOY, Circuit Judges, and PALMIERI,* District Judge.

(1) The mandate heretofore issued herein is recalled.

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*The Honorable Edmund L. Palmieri, Sr. United States District Judge for the Southern District of New York, sitting by designation.

(2) The late filing of the petition for rehearing of the Northern Cheyenne Tribe is permitted and the petition for rehearing shall be filed within 14 days from the date of filing of this order.

(3) The petition for rehearing may be of a length not to exceed 25 pages of standard typographic printing or 30 pages of printing by any other process.

(4) A response if any to the petition for rehearing shall be filed by the appellees herein within 14 days from the date of filing of the petition for rehearing and may be of the same length as authorized for the petition for rehearing.

TO CLERK OF COURT February 27, 1975
FROM JUDGE CHOY

RE: No. Cheyenne Tribe v. Littlebird, etc.
Nos. 73-1545/1546/1547

I certify that all judges concerned concur in the attached order. The clerk will please file.

/s/ HERBERT Y. CHOY
United States Circuit Judge

**Ninth Circuit Court of Appeals Judgment—
Entered October 17, 1974**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1545

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES,
Defendant-Appellant.

No. 73-1546

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appellee,

v.

ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN,
Defendants-Appellants.

No. 73-1547

THE NORTHERN CHEYENNE TRIBE,
Plaintiff-Appeliee,

v.

MYRON L. LITTLEBIRD,
Defendant-Appellant.

APPEAL from the United States District Court for the District of MONTANA (BILLINGS)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of MONTANA (BILLINGS) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

Filed and entered October 17, 1974

District Court Order Denying Motions for New Trial or to Amend Judgment—Entered November 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 883

ORDER

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST *et al.*,
Defendant.

Counsel for all of the named defendants have filed motions for a new trial or to amend the judgment. Prior to entry of its order of September 29, 1972, the court considered all of the statutes, treaties, executive orders, and cases cited in support of the motions and ruled against defendants' contentions.

Nothing has been presented to persuade the court to modify its conclusions. On the contrary, the court finds support in the per curiam opinion of the United States Supreme Court in United States v. Jim, No. 71-1509, and Utah v. Jim, No. 71-1612, 41 L.W. 3285, decided November 20, 1972. The Court held that a 1933 statute (47 Stat. 1418) conferring oil and gas royalties on Indians residing on the Anteh extension of the Navajo Reservation "did not create constitutionally protected property rights"

in the beneficiaries of the Act and upheld a 1968 Act (82 Stat. 121) enlarging the class of beneficiaries to include the entire Navajo tribe residing in San Juan County, Utah.

Defendants Williamson and Bowen, noting the similarity between the 1938 statutory grant to the residents of the Anteh extension and the 1926 Act upon which the defendants here rely, urged this court to follow the opinion of the Utah District Court (unreported) holding that the 1933 Act vested property rights in the Anteh extension residents and that the 1968 Act was unconstitutional.

The Supreme Court reversed. Following Gritts v. Fisher, 224 U.S. 640 (1912), the Court concluded:

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the ° ° ° royalties ° ° ° in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Anteh extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation."

The motions for a new trial or to amend the judgment are denied.

Done and dated this 28th day of November, 1972.

/s/ W. J. JAMESON
United States District Judge

District Court Judgment—Entered November 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. 883

JUDGMENT

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

v.

WILLIAM HOLLOWBREAST, *et al.*,
Defendant.

This cause came on to be heard on November 2, 1972, at the hour of 10:00 a.m. on a motion for summary judgment by plaintiff filed on October 9, 1972; the Court having considered the plaintiff's motion and the arguments of counsel, and the Court's written order and opinion of September 29, 1972, and, accordingly, as a matter of law, the plaintiff is entitled to a summary judgment in its favor upon all of the issues.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, did not receive a vested property right in the coal or other minerals, including oil and gas and other natural deposits, in and under their respective allotments which is protected by the Fifth Amendment to the Constitution of the United States.

2. That the defendants' petition for an injunction and counter-claims against the plaintiff be, and the same are hereby dismissed.

3. That the defendants' motion to add the United States of America as an additional party be, and the same is hereby denied.

4. That the defendants' cross-claims against the United States of America be, and the same are hereby dismissed.

DATED this 14th day of November, 1972.

/s/ W. J. JAMESON
United States District Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES

Act of June 3, 1926, 44 Stat. 690

An Act to provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him,

shall be the basis for allotting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred and sixty acres to any individual from the lands appearing on said approved list: *Provided,* That in allotting said lands each Indian shall be allotted a proportion of the agricultural and grazing lands, respectively, such lands whenever practicable and so far as possible to be contiguous: *Provided,* That trust patents shall be issued therefor of the form and legal effect authorized by the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

The right is hereby reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act, though such lands or a part thereof may be classified as timber lands.

Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and

may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Sec. 4. That authority is hereby vested in the Secretary of the Interior to cause to be reserved so long as they are needed and used for the benefit of the Northern Cheyenne, suitable lands for the following purposes: For school, agency, and other administrative purposes including not to exceed one thousand two hundred and eighty acres for the boarding school at Busby, Montana, and not to exceed one hundred and sixty acres for the Birney Day School, in all not exceeding two thousand seven hundred and eighty acres; for tribal cemeteries, where needed, not to exceed in all one hundred and sixty acres: *Provided*, That with the consent of the tribal council, lands may be reserved for religious and educational purposes, including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided further*, That such tracts, excepting only the tribal cemeteries, shall remain reserved only so long as they are used for the purposes for which they are set apart: *And*

provided further, That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians: *And provided further*, That the Secretary of the Interior is hereby authorized to reserve and set aside for town-site purposes not more than eighty acres at Lame Deer, Montana, and not to exceed forty acres at some other suitable location, and to survey and plat said tracts in blocks, lots, streets, alleys, parks, and school sites: *Provided further*, That the area reserved for park and school sites shall not exceed ten acres in any one town site, and patent shall be issued for such lands to the municipality legally charged with the care and custody of the lands hereby set aside for such purposes. That such town sites shall be appraised and disposed of as provided in section 2381 of the Revised Statutes: *Provided further*, That all the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. An area not exceeding sixty feet on either side of every section line within the said reservation is hereby dedicated as public highways whenever and so far as the same may be so declared by the county commissioners of the county in

which the same may be situated, and all allotments and patents hereby authorized shall be subject to the easement hereby created. In addition to reservations heretofore herein authorized the Secretary of the Interior shall withhold from allotment any tracts in legal subdivisions in which are springs or other like sources of water supply to which cattle have been accustomed to repair for drink, together with so much land contiguous thereto as may be necessary to permit access by stock to such water supply from the highways herein provided for.

Sec. 5. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided,* That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the city of Washington on tribal business.

Act of July 24, 1947, 61 Stat. 418

An Act to declare the ownership of the timber on the allotments on the Northern Cheyenne Indian Reservation, and to authorize the sale thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the Act of June 3, 1926 (44 Stat. 690), the timber on the

allotments on the Northern Cheyenne Indian Reservation, whether or not the lands were hitherto classified as chiefly valuable for timber, are hereby declared to be the property of the allottees and may hereafter be sold pursuant to the provisions of section 8 of the Act of June 25, 1910 (36 Stat. 857; 25 U. S. C., sec. 406). Nothing contained in this Act shall be construed to require the payment to the allottees of the proceeds of sales made prior to the passage of this Act.

Act of September 22, 1961, 75 Stat. 586

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), is hereby amended to read as follows:

"Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas or other natural deposits and regardless of the form of reference in such conveyance, or

lack of reference, to the minerals, oil, gas, or other natural deposits reserved by this Act.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent.

"(c) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Act of July 24, 1968, 82 Stat. 424

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"Sec. 3 (a) The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such

rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

EXECUTIVE ORDERS

Executive Order of November 26, 1884

Establishing Northern Cheyenne Reserve.

It is hereby ordered that the following-described coun-

try, lying within the boundaries of the Territory of Montana, viz: Beginning at the point on the one hundred and seventh meridian of west longitude (said meridian being the eastern boundary of the Crow Indian Reservation) where the southern 40-mile limits of the grant to the Northern Pacific Railroad Company intersects said one hundred and seventh meridian; thence south along said meridian to a point 30 miles south of the point where the Montana base line, when extended, will intersect said meridian; thence due east to a point 12 miles east of the Rosebud River; thence in a northerly and northeasterly direction, along a line parallel with said Rosebud River and 12 miles distant therefrom, to a point on the southern 40-mile limits of the grant to the Northern Pacific Railroad Company, 12 miles distant from said Rosebud River; thence westerly along the said southern limits and across the said Rosebud River to the place of beginning, be, and the same is hereby, withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of the Interior may see fit to locate thereon: *Provided, however,* That any tract or tracts of land included within the foregoing described boundaries which have been located, resided upon, and improved by bona fide settlers, prior to the 1st day of October, 1884, to the amount to which such settlers might be entitled under the laws regulating the disposition of the public lands of the United States, or to which valid rights have attached under said laws, are hereby excluded from the reservation hereby made.

CHESTER A. ARTHUR

Executive Order of March 19, 1900

Enlarging Northern Cheyenne Reserve

It is hereby ordered that the following-described tract of land lying in the State of Montana, the same being the tract described in Senate bill 2173, 56th Congress, 1st session, which tract includes the lands embraced in the boundaries set forth in Executive order issued November 26, 1884, relative to the Northern Cheyenne reserve, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, which reservation shall be known as the Northern Cheyenne Indian Reservation, viz:

Beginning at the point in the middle of the channel of Tongue River at its intersection with the southern forty-mile limits of the grant to the Northern Pacific Railroad Company; thence west on the said southern forty-mile limits to its intersection with the eastern boundary line of the Crow Indian Reservation; thence south on said boundary line to its intersection with the line dividing townships five and six south; thence east on said dividing line of townships five and six south; to its intersection with the line dividing ranges forty and forty-one east; thence north on said line dividing ranges forty and forty-one east to the line dividing townships four and five south; thence east on the line dividing townships four and five south to its intersection with Cook Creek; thence down Cook Creek to its confluence with Tongue River; thence down the middle of the channel of Tongue River to the place of beginning: *Provided, however,* That if upon the survey or

resurvey of the boundary lines already established it shall be found that the main stream of Cook Creek on or near the range line between ranges forty and forty-one lies south of the line dividing townships four and five south, then in that case the line running north on the range line between ranges forty and forty-one shall extend north only to the intersection of said line with the main stream of Cook Creek, and thence down Cook Creek as hereinbefore provided: *Provided further,* That in the erection of the reservation boundary fence along said Cook Creek the same shall be so erected as to divide the waters as near as may be between the north and south sides thereof: *Provided further,* That certain tracts approximating sixty-five acres, lying west of Tongue River, in sections twenty-six and thirty-four south, of range forty-three east, owned by Joseph Scott, and the northeast quarter of section three in township three south, of range forty-four east, belonging to Saint Labra's Mission, and the south half of the northwest quarter of section ten in township two south, of range forty-four east, belonging to R. P. Colbert, and the south half of section seven, in township two south, range forty-four east, belonging to John Barringer, shall be excepted from and not included within the reservation boundaries named.

WILLIAM MCKINLEY

APPENDIX D

TRIBAL DOCUMENTS

Letter from Northern Cheyenne Chiefs and Headsman to Senator Thomas J. Walsh Enclosing Petition for Allotment—dated February 3, 1925

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN FIELD SERVICE
Tongue River Agency.
Lame Deer, Mont.

February 3, 1925.

Hon. T. J. Walsh,
U. S. Senator,
Washington, D. C.

Dear Mr. Walsh:

We transmit herewith a petition signed by all of the people belonging to this reservation that we were able to see in the short time allowed. In fact we encountered no opposition whatever, and they were all in hearty accord with the allotment idea. Also we thought it advisable to get you the following data and reasons for allotment so as to arm you for argument with the Indian Office. We can assure you in advance that all the data contained in our letter is authentic:

No. 1. Present Farm acreage.....20,000
No. 2. Available " " .....80 to 100,000

Crops raised during the past year:

Tonage of hay	6,000 Tons
Oats	34,220 Bu.
Wheat	37,456 Bu.
Potatoes	5,000 Bu.
Corn	3,000 Bu.

Reimbursable—The flour mill should be reimbursed from grazing funds instead of robbing the Indians for grinding

fee, (this mill was promised by a treaty to the Indians). Approximately $33,000 should have been collected by grinding fee in the last eight years and $9.25 was all that was ever turned in toward this flour mill debt up to the time the present Superintendent came here—January 1, 1924.

The Northern Cheyennes are better prepared to receive allotment than the majority of tribes at the time they were allotted. The reason why we make this statement is the facts to be gathered by the farm reports of the last two or three years which are available for inspection.

Heirship Troubles—Allotment will enhance permanency of future farm activities, and the enhancement of the Five Year Program will solve the heirship trouble in the matter of probating estates which at present is in a very unsatisfactory and chaotic condition.

By making them an allotment they will make greater efforts to improve both their land and conditions of living and therefore become better citizens.

At the present time and under the present conditions they hesitate to carry out to their full capacity their home building and farm and livestock production, not knowing where the boundaries of their lands are, and also not knowing whether they will ever get any such lands because of this being an Executive Order Reservation, and subject to will of the Congress of our Nation.

All Reimbursable tribal debts for sawmills, steam engines, threshing machines, and gasoline tractors and all other reimbursable tribal implements should be paid from the grazing fund or any other funds that may be to the credit of the Northern Cheyennes, as these funds become available from time to time.

There is a tribal debt for an irrigation ditch on Tongue River of approximately $140,000, and at the present time the above ditch is useless on account of the need for repairs and as a rough estimate, it will take probably about $25,000 to repair it and make it fit for use.

Along with this ditch debt there is a tribal herd called the RC that was purchased with reimbursable funds about $100,000 and is still a debt against the tribe and at the present there is probably 168 head of cattle left in said herd.

Also besides the Tribal debts above mentioned there is an enormous individual Indian reimbursable debt that is hanging over the Northern Cheyennes.

The debts are due June 30, 1925.

But, as the tribe or the Indians individually are unable to meet these obligations we ask that the two last mentioned tribal debts be cancelled, and an extention of twenty-five years be given the Individual Indians so that they may have time to pay their debts to the Government, through the proceeds of their labor and not by the taking of their tribal resources to be applied on the debt.

Under these circumstances the Government should be protected by making an allotment of lands into severalities to these Indians so that in case of death there may be some collateral available by which the debt may be liquidated for the deceased personal obligations, which heretofore has not been possible. There were Indians who contracted some of the debts and are dead and according to the wording of the contract, their heirs are responsible for the debt, and thus the request for allotment to make this protection for the Government.

Also we wish to advise you that when the Commissioner of Indian Affairs was here in Sept. 1923, he promised us people that he would see that we were allotted, and in conclusion we thank you for your aid in getting us allotted and for Mr. Burke to keep faith with us,

Very truly yours,

Chiefs

/s/ EUGENE STANDING ELK
VICTOR LITTLE CHIEF [his thumbprint]
OTIS FINGERS [his thumbprint]

Headsmen

CHAS. SPOTTED ELK [his thumbprint]
JOHN TWO MOONS [his thumbprint]
DAVID LITTLE WHITE MAN [his thumbprint]

Attest

/s/ RUFUS ROLLINGBULL
/s/ CHAS. TALLBULL
/s/ JOHN TALLWHITEMAN

Petition of Northern Cheyenne People to Senator Thomas J. Walsh Requesting Allotment— submitted February 3, 1925

A PETITION TO
THE HON. T. J. WALSH, U. S. SENATOR

We, the undersigned members of the Northern Cheyenne Indian Tribe, of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.

To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.

As our Reservation is rather small, and as we understand that the old Fort Keough Military Reservation has been abandoned for military purposes, we ask you to try and have enough land to give each member of the tribe the above asked for 320 acres.

[Followed by 37 pages of marks, thumbprints and signatures of approximately 500 members of the Northern Cheyenne Indian Tribe]

Form of Trust Patent for Northern Cheyenne Allotments

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that in accordance with the provisions of the Act of Congress of June 3, 1926 (44 Stat. 690), ... an Indian of the Northern Cheyenne Indian Reservation, has been allotted the following described land as a Homestead:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of the said allottee, inalienable and nontaxable for the period of twenty-five years from date hereof, or until the death of said allottee, and that at the expiration of said period the United States will convey to said Indian, or to her heirs, as the case may be, the fee to said land, discharged of said trust and free of all charges or incumbrance whatsoever. Should said Indian die before the expiration of said twenty-five years, then the Secretary of the Interior shall determine the heirs of said Indian and either issue to them a patent in fee for said land, or cause the same to be sold for their benefit as provided by law.

There is reserved from the land hereby allotted a right of way thereon for ditches or canals constructed by the authority of the United States. There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land. An area not exceeding sixty feet on either side of every section line within the said reservation, dedicated by said Act as public highways whenever and so far as the same may be so declared by the county commissioners of the county in which the same may be situated, it also reserved.

IN TESTIMONY WHEREOF, I, HERBERT HOOVER, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the day of in the year of our Lord one thousand nine hundred and and of the Independence of the United States the one hundred and

By the President:

By.....,Secretary
Recorder of the General Land Office

RECORDED: Patent Number